

STATE OF MICHIGAN
COURT OF APPEALS

In re Estate of JAMES CLINTON BUCHANAN, a
Legally Protected Person.

NICHOLS & EBERTH, P.C.,

Petitioner-Appellee,

v

TITAN INSURANCE COMPANY,

Respondent-Appellant.

UNPUBLISHED

August 12, 2003

No. 238939

Wayne Probate Court

LC No. 00-623707-CV

Before: Donofrio, P.J., and Bandstra and O'Connell, JJ.

PER CURIAM.

Respondent appeals as of right an order denying its motion for reconsideration and holding respondent in contempt of court for failing to comply with the probate court's order of November 12, 2001. We reverse and remand.

James Buchanan was involved in an automobile accident in 2000, and sustained a closed head injury rendering him legally incapacitated. Theresa Buchanan was appointed James Buchanan's conservator and guardian. Theresa Buchanan subsequently retained the legal services of Charles L. Nichols of petitioner, Nichols & Eberth, P.C. Nichols provided a number of legal services to Theresa Buchanan, and submitted a claim to respondent for payment of those legal services. Respondent paid a portion of the legal fees and petitioner sought an order from the Wayne County Probate Court requiring respondent to pay the remainder of the fees. After a hearing on November 12, 2001, at which only petitioner was present, the probate court entered an order requiring respondent to pay petitioner's bill for legal services rendered to the estate of James Buchanan. Respondent filed a motion for reconsideration that was denied by order dated January 7, 2002. In addition, the probate court held respondent in contempt of court for failing to comply with the court's order of November 12, 2001.

Respondent's first argument on appeal is that the trial court erred in finding respondent responsible for paying legal fees incurred by petitioner in pursuit of tort claims on behalf of the estate of James Buchanan. We agree.

Whether attorney fees are recoverable under MCL 500.3107(1)(a) is a question of law which this Court reviews de novo. *In re Shields Estate*, 254 Mich App 367, 369; 656 NW2d 853 (2002). The relevant law regarding applicable personal injury protection (PIP) benefits is set out in *In re Shields, supra*, 254 Mich App 369-370:

The scope of PIP benefits is dictated by statute. *Rohlman v Hawkeye-Security Ins Co*, 442 Mich 520, 524-525; 502 NW2d 310 (1993). Under MCL 500.3105(1), a PIP insurer must pay benefits for accidental bodily injury arising out of the use of motor vehicles. See *Nelson v Transamerica Ins Services*, 441 Mich 508, 517-518 n 23; 495 NW2d 370 (1992). However, a claimant's recovery under MCL 500.3105(1) is limited to "allowable expenses," which are defined by MCL 500.3107(1)(a) as "all reasonable charges incurred for reasonably necessary products, services and accommodations for an injured person's care, recovery, or rehabilitation." See *Owens v Auto Club Ins Ass'n*, 444 Mich 314, 323; 506 NW2d 850 (1993). Although such expenses are not limited to medical care, they must be causally connected to the injured person's care, recovery, or rehabilitation. *Hamilton v AAA Michigan*, 248 Mich App 535, 544-545; 639 NW2d 837 (2001).

The costs associated with a guardian and conservator appointed as a result of an incapacity arising out of injuries sustained in an automobile accident are allowable expenses under MCL 500.3107(1)(a). *Heinz v Auto Club Ins Ass'n*, 214 Mich App 195, 196-197; 543 NW2d 4 (1995). It is not enough that a conservator's expenses would not have been incurred but for the accident. *In re Shields, supra* at 370-371. Each particular expense must be proved by the plaintiff to be reasonable and necessary before an insurer can be held liable for reimbursement under § 3107. *Spect Imaging v Allstate Ins*, 246 Mich App 568, 576; 633 NW2d 461 (2001).

In *Hamilton v AAA Michigan*, 248 Mich App 535; 639 NW2d 837 (2001), this Court considered the question of whether in-hospital telephone and television charges are allowable expenses under MCL 500.3107(1)(a). In analyzing the question this Court stated:

In this regard, we note that "reasonable" is defined as "agreeable to or . . . logical" and that "necessary" means "essential, indispensable, or requisite." *Random House Webster's College Dictionary* (1997). In addition, we note that "care" entails "serious attention" or "protection" and that "recovery" refers to "restoration or return to any former or better condition, esp[ecially] to health from sickness, injury, addiction, etc." *Id.* Further, we note that "rehabilitate" is defined as "to restore or bring to a condition of good health, ability to work, or productive activity." [*Id.*, 546.]

This Court found that whether charges for inpatient telephone and television services are reasonably necessary to a patient's care, recovery or rehabilitation is a question of fact that requires consideration of individual circumstances of each claimant.

In ruling that respondent was responsible to pay the legal fees incurred by petitioner for its work on behalf of the estate of James Buchanan, the probate court held that because the estate was maintained or increased as a result of the efforts of petitioner, the fees were allowable expenses under the Michigan no-fault act.

In the complete absence of any evidence from petitioner regarding whether its pursuit of a possible medical malpractice claim, product liability claim or other tort claim on behalf of James Buchanan is reasonably necessary to his care, recovery or rehabilitation, we turn to the plain language of the statute and the ordinary usage of the words. The legal fees charged by petitioner for services such as a telephone conferences with product liability attorneys, reviewing a police report, and traveling to the intersection where the accident occurred, while possibly having the effect of enlarging the estate of James Buchanan, are not “essential” to his care or to the “restoration” of his good health. It is true that petitioner’s fees would not have been incurred but for the accident, but this fact does not make petitioner’s services necessary for James Buchanan’s care which is the standard of inquiry in this case. Therefore, we find these fees are not compensable under MCL 500.3107(1)(a).

Respondent next argues that the trial court erred in finding respondent responsible to pay petitioner’s legal fees incurred in connection with the estate’s claim for personal injury protection benefits. We agree.

Again, whether attorney fees are recoverable under MCL 500.3107(1)(a) is a question of law which this Court reviews de novo. *In re Shields Estate, supra*, 254 Mich App 369. With regard to the payment of attorney fees, the Michigan no-fault act provides:

An attorney is entitled to a reasonable fee for advising and representing a claimant in an action for personal or property protection benefits which are overdue. The attorney’s fee shall be a charge against the insurer in addition to the benefits recovered, if the court finds that the insurer unreasonably refused to pay the claim or unreasonably delayed in making proper payment. [MCL 500.3148(1).]

An award of attorney fees is authorized by MCL 500.3148(1) only in connection with representation concerning personal injury protection insurance benefits that are overdue or unreasonably denied. *McKelvie v ACIA*, 459 Mich 42, 44-45; 586 NW2d 395 (1998); *Beach v State Farm*, 216 Mich App 612, 628-630; 550 NW2d 580 (1996).

Here, there was no evidence that James Buchanan’s personal injury protection benefits were overdue. Nor was there any evidence that respondent unreasonably refused to pay a claim or unreasonably delayed in making proper payment. Indeed, petitioner’s own statements on the record indicate that respondent never refused to pay on the personal injury claim. As there was no evidence that respondent unreasonably delayed payment or unreasonably refused to pay James Buchanan personal injury protection benefits, the trial court erred in ordering respondent to pay legal fees for petitioner’s services pertaining to the personal injury protection benefits claim.

Finally, we find that the probate court erred in denying respondent’s motion for reconsideration of the trial court’s November 12, 2001, order requiring respondent to pay the legal fees of petitioner. This Court reviews a trial court’s decision to deny a motion for reconsideration for an abuse of discretion. *In re Beglinger Trust*, 221 Mich App 273, 279; 561 NW2d 130 (1997). “An abuse of discretion exists when the result is so palpably and grossly violative of fact and logic that it evidences perversity of will or the exercise of passion or bias rather than the exercise of discretion.” *Churchman v Rickerson*, 240 Mich App 223, 233; 611 NW2d 333 (2000).

Due process in civil cases requires notice of the nature of the proceedings, *Van Slooten v Larsen*, 410 Mich 21, 53; 299 NW2d 704 (1980), and an opportunity to be heard in a meaningful time and manner, *In re Juvenile Commitment Costs*, 240 Mich App 420, 440; 613 NW2d 348 (2000). Notice must be reasonably calculated to apprise interested parties of the pendency of the action and must afford them an opportunity to present objections. *Dusenbery v United States*, 534 US 161, 168, 170; 122 S Ct 694; 151 L Ed 2d 597 (2002), *Vicencio v Jaime Ramirez, MD, PC*, 211 Mich App 501, 504; 536 NW2d 280 (1995). Actual receipt of notice is not required. *Dusenbery, supra*, 534 US 170. There is a presumption of receipt by the addressee of mail addressed, stamped, and entrusted to the United States postal service for delivery, but this presumption can be overcome by direct and positive testimony to nonreceipt. *Merchants' Nat Bank v Detroit Trust Co*, 258 Mich 526, 535; 242 NW 739 (1932). "Underlying the right to due process are the principles of fair play and fundamental fairness." *Building Owners Ass'n v PSC*, 131 Mich App 504, 513; 346 NW2d 581 (1984), *aff'd* 424 Mich 494 (1984).

While a notice of hearing and proof of service were filed regarding the November 12, 2001, hearing on the petition requesting an order for payment of petitioner's legal fees by respondent, respondent claimed that it did not receive notice. In support of this claim, respondent filed an affidavit by the office manager of respondent's law office stating that she was responsible for opening the firm's mail and entering dates on the firm's calendar and further stating that if she had received the notice of hearing, she would have logged it into the calendar. A copy of the firm's calendar showing no entry for the November 12, 2001, hearing was also submitted to the court. In this manner, respondent rebutted the presumption that Notice of Hearing was received by respondent.

Our legal system favors disposition on the merits. *Vicencio, supra*, 211 Mich App 507. Here, respondent's absence was likely unintentional, and the result of the denial of the motion for reconsideration is a disposition wholly in favor of petitioner with no opportunity for respondent to present argument or evidence in support of its position, we find the denial of respondent's motion for reconsideration an abuse of discretion. *Id.*, 506-507.

Because we find the probate court abused its discretion in denying respondent's motion for reconsideration, we need not address respondent's last issue, whether the trial court erred in finding that \$200 was a reasonable hourly rate for Charles Nichols' legal services.

Reversed and remanded to the probate court for an evidentiary hearing on the reasonableness of the attorney fees incurred by petitioner in connection with services reasonably necessary for the care, recovery and rehabilitation of James Buchanan. We do not retain jurisdiction.

/s/ Pat M. Donofrio
/s/ Richard A. Bandstra
/s/ Peter D. O'Connell